No. 83-173

In the Supreme Court of the United States

OCTOBER TERM, 1983

MILTON R. WASMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court's imposition of a higher sentence at petitioner's retrial, to take into account a conviction subsequent to the first trial, violated the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence on retrial (Pet. App. A1-A32) is reported at 700 F.2d 663. The opinion of the court of appeals reversing petitioner's initial conviction is reported at 641 F.2d 326.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1983, and a petition for rehearing was denied on June 2, 1983 (Pet. App. A68-A69). The petition for a writ of certiorari was filed on August 1, 1983, and was granted on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of knowingly and willfully making a false statement in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to two years' imprisonment, all but six months of which was suspended, and to three years' probation commencing upon discharge from incarceration. J.A. 2-3. The conviction was reversed on appeal on grounds not relevant to the issue now before the Court. 641 F.2d 326 (5th Cir. 1981). Thereafter, petitioner was convicted at a second jury trial. He was sentenced to two years' imprisonment. J.A. 4-5. The court of appeals affirmed (Pet. App. A1-A32).

1. The evidence adduced at the second trial showed that on March 1, 1978, petitioner applied for a United States passport in the name of David Hibbert Hendrick, Jr. Petitioner told the passport examiner that he had forgotten his wallet and therefore had no identification, but that his secretary would swear out an affidavit identifying him as Hendrick. Petitioner then filled out a passport application in the name of "Hendrick." In addition to the false name, he gave a fictitious date of birth, place of birth, next of kin, mother, and father. Petitioner also reported that he had never been married and that he had never previously been issued a passport, although in fact he was married and possessed a current passport in the name of "Wasman." Petitioner signed the passport application and swore that the statements he had made therein were true and correct to the best of his knowledge. He also informed the passport examiner that he intended to travel abroad within the next few days and that therefore he needed the passport as soon as possible. The passport was issued, and

petitioner's secretary picked it up the next day. Tr. 76-88, 93-96; GXs 1, 2, 6.

In order to rebut petitioner's defense that he had legally assumed the name "Hendrick," the government introduced evidence showing that, after posing as Hendrick to obtain the passport, petitioner continued to use the name "Wasman" for other purposes. For instance, on the same day that he applied for the passport, petitioner also applied for a renewal of his driver's license in the name of "Wasman." He applied for a duplicate copy of the license approximately three months later, again using the name "Wasman." Tr. 128-130; GXs 20-22.

In defense, petitioner testified that he needed a passport in a non-Semitic name in order to sell Florida real estate to a group of Arab investors (Tr. 228-232, 240-241, 268).

2. At the sentencing hearing following petitioner's conviction at the first trial, the government advised the district court (Roettger, J.) that petitioner had one prior conviction for failure to file a tax return and also was under indictment on four counts charging mail fraud (J.A. 22-23). The court stated, in accord with defense counsel's request, that it would not consider the unresolved mail fraud charges in passing sentence.[1] The court explained (J.A. 26):

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[1] Defense counsel stated (J.A. 25-26):

> Second point I'd like to respond or rebut is that the suggestion on the part of the prosecuting attorney that [petitioner] is involved or has been involved in a large scheme involving fraud. The Government has brought an Indictment to that effect more than a year ago in this Court.
>
> * * * * *
>
> * * * I am simply making the point that the Government attempts to paint with a broad black brush here and sug-

> I don't consider pending cases in determining sentence because my theory of sentencing is simply that one can consider prior convictions, and each judge who has somebody with more than one conviction should consider it, not only may, but should consider prior convictions, give whatever weight that judge feels is appropriate, but if judges at the time of considering prior convictions also consider pending cases, and then if that pending case resulted in a conviction, one of the sentences would inevitably have been a pyramided sentence. Consequently, I don't consider pending cases on that basis.

The court then sentenced petitioner to two years' imprisonment, all but six months of which was suspended in favor of three years' probation (J.A. 2-3, 28-29).

Thereafter, pursuant to negotiations with petitioner (see Supp. App. 3, 11),[2] the government dismissed the pending mail fraud indictment and substituted a one-count information charging petitioner with possession of counterfeit certificates of deposit, in violation of 18 U.S.C. 480. Petitioner pleaded nolo

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gests that somehow [petitioner] comes before this Court tainted by virtue of a grand jury indictment where [petitioner] was not before the grand jury. [Petitioner] has never had his opportunity to tell that grand jury or a Court or a jury or anybody else in a position to make a decision in this matter what his position and his version is of that matter.

So I, in rebuttal, respectfully suggest it's not appropriate for the Government to be arguing that [petitioner] is entitled to some sort of enhanced punishment in this passport case by virtue of the fact that there is a pending grand jury indictment for mail fraud.

[2] "Supp. App." refers to the appendix to petitioner's brief on the merits.

contendere to that charge and was found guilty by the court (Davis, J.) (Supp. App. 3-15). He was sentenced to two years' probation (*id.* at 16-39), a sentence that the court characterized as "lenient" (*id.* at 39).

Thereafter, the court of appeals reversed petitioner's initial conviction on the false passport charge on the ground that certain proffered evidence should have been admitted. 641 F.2d 326 (5th Cir. 1981). Following his retrial and conviction, petitioner was sentenced by Judge Roettger, who had also presided at the first trial, to two years' imprisonment, with no portion of the sentence suspended (Pet. App. A33-A66). The court explained that it was altering petitioner's sentence from that imposed at the first trial to take into account the intervening conviction on the counterfeit certificates of deposit charge (*id.* at A42-A59). The court stated (*id.* at A42):

> [W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time he comes before me with two convictions. Last time, he came before me with one conviction.

The court explained the significance of this additional conviction (*id.* at A58): "At the time of the first sentencing, I just thought that [petitioner] was one of those people who couldn't see the out-of-bounds lines very clearly and didn't care too much which side of it he was on." Thus, in the court's view, this additional conviction shed new light on petitioner's character and rendered inappropriate a sentence with all but six months suspended.

3. The court of appeals affirmed petitioner's conviction and sentence (Pet. App. A1-A32). Specifically, the court held that the modification of petitioner's sentence on retrial was not motivated by judicial vindictiveness and that it comported with the guidelines for enhanced sentencing established by this Court in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The court explained (Pet. App. A15):

> Judge Roettger followed precisely the procedural steps of *Pearce*, affirmatively stating on the record his reason for enhancing the sentence, basing that reason on objective information concerning identifiable conduct of the defendant, and making the factual data on which his action was based part of the record so that its constitutional legitimacy may be fully reviewed on appeal[.]

The court of appeals specifically rejected petitioner's argument that his conviction on the counterfeit certificates charge could not provide the basis for enhancement of his sentence because it was not "conduct on the part of the defendant occurring after the time of the original sentencing" (see *Pearce*, 395 U.S. at 726). The court of appeals stated that that argument "concerns but a part of the means, and ignores the end sought to be achieved in *Pearce*. It exalts words above substance." Pet. App. A19. The court explained (*id.* at A19-A20, A24):

> [A] rigid limitation of increased sentences to those based on misconduct occurring after the first sentencing would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness.
>
> * * * * *

> The target in *Pearce* was vindictive sentencing, not defendant misbehavior between trials. No reason exists for applying a phrase in the *Pearce* guidelines to circumstances bearing no relation to the purpose of those guidelines. There is on this record no evidence whatsoever that the enhancement here resulted from vindictiveness of Judge Roettger. Nor does [petitioner] argue that it did. In such circumstances, an increased sentence neither thwarts the purpose of *Pearce* and its guidelines nor offends constitutional due process considerations.

After reviewing this Court's post-*Pearce* decisions concerning vindictive sentencing, the court of appeals concluded that "where as here the record establishes a total absence of any 'realistic likelihood' of vindictiveness, an increased sentence does not offend the Due Process Clause" (Pet. App. A26-A27).

SUMMARY OF ARGUMENT

A. The normal broad latitude given to judges in imposing sentence is constrained somewhat in the case of resentencing following a successful appeal and reconviction. In *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969), this Court held that the possibility that an increased sentence on retrial could be motivated by a desire to retaliate against a defendant for challenging his conviction, which would violate due process, requires a prophylactic rule prohibiting such a sentence increase unless it is adequately explained by reasons placed on the record by the sentencing court. Despite this initial presumption of vindictiveness, *Pearce* and a consistent line of authority deriving from it make clear that the due process concern in this context is with actual vin-

dictiveness (or a defendant's realistic fear of such actual vindictiveness) in resentencing. See generally *United States* v. *Goodwin*, 457 U.S. 368 (1982). Thus, when a showing is made demonstrating a sound, nonvindictive reason for increasing the sentence over that imposed at the first trial, the presumption of vindictiveness is dispelled and the dictates of due process are satisfied.

B.1. For purposes of explaining the reason for an increased sentence and thereby dispelling the presumption of vindictiveness, it is not apparent that there should be a constitutional difference between relying on events that occur subsequent to the first sentencing proceeding and relying on earlier events that do not come to light until after the first sentence is imposed. Nevertheless, the prophylactic rule as set forth in dictum in *Pearce* limits the allowable bases for increasing the sentence to events that occur after the first trial. We submit that this apparently inflexible limitation should be treated as subject to reconsideration as different fact situations arise. The temporal limitation was not necessary to the decision in *Pearce* and was established without the benefit of briefing by the parties; it seems clear that all its ramifications were not considered by the Court at the time. Such a limitation does not advance the policies of *Pearce* and can lead to the exclusion of extremely significant sentencing information in some cases, for example, when the defendant's earlier participation in serious crimes does not come to light until after the first trial.

2. In this case, it is clear that the sentencing court's reason for imposing the increased sentence satisfies the *Pearce* rule; the court based the increase on petitioner's conviction on another charge—an

event that occurred after the first sentencing proceeding. Petitioner's argument that the *Pearce* rule allows consideration only of "conduct on the part of the defendant" (395 U.S. at 726) that occurs after the second sentencing proceeding is clearly refuted when this statement is considered in the context of the entire *Pearce* decision. *Pearce* unequivocally states that *events* occurring subsequent to the first trial appropriately, and constitutionally, may be considered in imposing a greater sentence at a retrial. Neither the rationale of *Pearce*, the other opinions in the case, nor later statements by this Court suggest that the Court intended that such "events" be limited to those involving conduct by the defendant subsequent to the first trial.

The rule proposed by petitioner would seriously interfere with sensible sentencing policy. For example, as illustrated in this case, in many instances it would prevent the sentencing court from considering a defendant's prior convictions, even for very serious crimes. This would not necessarily benefit defendants as a class; it could make courts more prone to consider unresolved charges pending at the time of sentencing. The results of the rule advanced by petitioner are particularly irrational where the defendant pleads guilty the first time, receives a more lenient sentence on that account, and then pleads not guilty at retrial after his first conviction is reversed. If the second sentencing court is limited to the sentence imposed by the first court because the increase would not be based on intervening "conduct by the defendant," the court would be required to keep its part of the bargain in imposing a lenient sentence even though the defendant did not keep his

part of the bargain by pleading guilty. See Fed. R. Crim. P. 11(e)(1)(C) and (4); *Corbitt* v. *New Jersey*, 439 U.S. 212, 223-224 (1978). In short, the proffered distinction between "events" and "conduct of the defendant" interferes with sound sentencing, does not advance the policies of due process, and is not supported by a reading of *Pearce* as a whole. Therefore, petitioner's intervening conviction—an event that occurred subsequent to his first sentencing—justifies the increase in his sentence.

3. In the particular circumstances here, it is clear beyond any doubt that petitioner's increased sentence was not motivated by vindictiveness and hence was not violative of due process. The record of the first proceeding demonstrates that the court, acceding to defense counsel's request, stated its intent not to consider the unresolved charges pending against petitioner although it always considered prior convictions to be highly relevant for sentencing. Thus, the court's invocation of petitioner's intervening conviction to increase his sentence following retrial could not be a post hoc rationalization masking a retaliatory motivation; that increase was necessary to follow the court's previously announced sentencing policy. Indeed, as the court of appeals stated (Pet. App. A24), petitioner does not even appear to contend that the sentence was motivated by vindictiveness; hence, it does not violate due process. See *Moon* v. *Maryland*, 398 U.S. 319 (1970).

ARGUMENT

THE IMPOSITION OF A HIGHER SENTENCE FOLLOWING PETITIONER'S RETRIAL TO TAKE INTO ACCOUNT AN INTERVENING CONVICTION DID NOT VIOLATE DUE PROCESS

This Court has long recognized that it is appropriate for a sentencing authority to consider a broad range of information in determining the proper sentence to impose on a convicted defendant. See generally *Roberts* v. *United States*, 445 U.S. 552, 556 (1980); *United States* v. *Grayson*, 438 U.S. 41, 45-50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The consideration of information extrinsic to the charged offense is necessary to advance the sentencing philosophy presently prevailing in the federal system and that of many states that "the punishment should fit the offender and not merely the crime." *Williams* v. *New York*, 337 U.S. 241, 247 (1949). Indeed, Congress had specifically provided that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" (18 U.S.C. 3577). And this Court has stated that such character information is "[h]ighly relevant—if not essential—to [the court's] selection of an appropriate sentence." *Williams* v. *New York*, 337 U.S. at 247.

This Court has held, however, that in sentencing a defendant who has been convicted at a retrial following a successful challenge to his original conviction, the Due Process Clause places a limited restraint on the sentencing court's usual discretion to consider all relevant information and to impose the sentence that seems most appropriate on the record before it. *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969). This holding derived from concern that the trial judge might act vindictively in that situation

and impose a higher sentence on a defendant to penalize him for taking an appeal or seeking collateral relief. To protect against this possibility of unconstitutional conduct, the Court laid down a "prophylactic rule" (see *Colten* v. *Kentucky*, 407 U.S. 104, 116, 118 (1972)) requiring the trial court to place on the record its reasons for imposing a higher sentence. The effect of the rule is to create a rebuttable presumption: an unexplained higher sentence on retrial will be presumed to be vindictive, and hence violative of due process, but that presumption may be rebutted by reference to the reasons affirmatively given by the sentencing court.

While recognizing that "events subsequent to the first trial that may have thrown new light upon the defendant's" character may appropriately—and constitutionally—be considered in increasing his sentence at retrial (395 U.S. at 723), dictum in *Pearce* also states that the reasons placed in the record to justify an increased sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (*id.* at 726). This case raises the question of what sorts of information may justify the imposition of a higher sentence following retrial and whether the narrow scope of the dictum of *Pearce* should be reconsidered. Specifically, the question here is whether the court's imposition of a higher sentence on petitioner's retrial to reflect his intervening conviction on another charge satisfies the due process concerns identified in *Pearce*. We submit that it does, and that the court's explanation of its increased sentence here plainly rebuts any presumption of vindictiveness and satisfies both the letter and the spirit of *Pearce*.

A. The Due Process Concerns Identified In *Pearce* Are Completely Alleviated When The Second Sentence Is Not Actually Motivated By Vindictiveness

The decisions of this Court dealing with the possibility of vindictive action by judges, juries, or prosecutors make clear that the due process concerns in this context are with actual vindictive action punishing a defendant for his legitimate exercise of a legal right. If such vindictiveness is not a realistic possibility in a given setting, or if the circumstances of a particular case make it unreasonable to presume a vindictive motivation, the imposition of a higher sentence or charge upon a defendant plainly does not violate the Due Process Clause.

In *Pearce*, this Court had before it two cases in which state trial judges had significantly enhanced the sentences imposed on convicted defendants after those defendants had successfully invoked post-conviction review procedures and obtained reversal of their original convictions. The Court stated that "[d]ue process of law * * * requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" (395 U.S. at 725). The Court further stated that in order to prevent unconstitutional deterrence of a defendant's right to challenge his first conviction, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge" (*ibid.* (footnote omitted)). The Court concluded that a prophylactic rule was necessary to protect against the possibility of such a due process violation (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge

> imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

The adoption of such a rule was calculated to alleviate both of the due process concerns identified by the Court earlier in its opinion: a reviewing court could assess the reasons given by the sentencing court and satisfy itself that actual vindictiveness played no role in the higher sentence on retrial, and the existence of this procedure would assure defendants that there was no reason to fear that they would be punished at a retrial for having exercised their right to attack their conviction.

Petitioner apparently argues (Br. 11) that a showing that there is no realistic likelihood of actual vindictiveness in a particular case is not sufficient to satisfy the dictates of the Due Process Clause. Petitioner claims (Br. 11) that the purposes of *Pearce* are "to avoid the appearance of vindictiveness and to remove the apprehension of fear from the mind of the defendant at a time when he must decide whether to take an appeal." As noted above, however, the requirement that the sentencing judge place his reasons for the increased sentence in the record, and that they be such as reasonably to justify the difference in sentences, plainly removes any appearance of vindictiveness and ought to remove any realistic fear on the part of the defendant that his second sentence will be increased in retaliation for appealing.

Petitioner appears to argue, however, that at the time the defendant decides whether to take an appeal he ought to be free from the fear that appealing could

result in the imposition of a higher sentence (even if not actually motivated by vindictiveness), because otherwise that fear would have a "chilling effect" on his decision whether to exercise a legal right to appeal (see Pet. Br. 17). This argument is foreclosed by a consistent line of decisions of this Court.

1.a. *North Carolina* v. *Pearce* is itself inconsistent with the view that due process requires the decision to appeal to be free of a "chilling effect" caused by the bare possibility of a higher sentence on retrial. In order to guarantee a "free and unfettered decision as to whether to take an appeal" (Pet. Br. 6), it would be necessary to eliminate completely the possibility that a higher sentence could be imposed after retrial. But that position, of course, was rejected by the Court in *Pearce* when it declined to recognize a double jeopardy restriction on the second sentence[3] and instead held that a higher sentence could be imposed after retrial if it were explained by reasons that demonstrated a lack of actual vindictiveness. Moreover, in *Moon* v. *Maryland*, 398 U.S. 319, 320 (1970), the Court explicitly stated that there was "no claim * * * that the due process standard of *Pearce* was violated" because the defendant conceded that the judge in that case was not actually vindictive.[4]

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[3] Justice Harlan specifically noted in his partial dissent that the Court's analysis would burden the defendant's decision whether or not to appeal because of the possibility that he ultimately would be worse off after appealing than if he had chosen not to challenge his first conviction. 395 U.S. at 746.

[4] The Court had granted certiorari in *Moon* to consider the retroactivity of *Pearce*. The Court dismissed the writ as improvidently granted when it came to light that there was no claim of actual vindictiveness and hence no *Pearce* violation in any event.

b. The decisions of this Court in cases outside the immediate *Pearce* context show that there is no constitutional infirmity in a subsequent, *nonvindictive*, increased charge or sentence even if the possibility of such an outcome might chill or deter the exercise of a legal right.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court held that due process was not violated by the imposition of a higher sentence at the second stage of a two-tier prosecution system in which the defendant could appeal automatically from a conviction in an inferior court and obtain a trial de novo in a court of general jurisdiction. The Court explained that the possibility of vindictiveness was not inherent in the Kentucky system in the way that it was in *Pearce*. Hence, a defendant would not be deterred from appealing by the apprehension of such vindictiveness. *Id.* at 116. The Court recognized, of course, that the superior court often will have the power to impose a more severe penalty than the defendant received in the inferior court. But as long as that increased sentence is not "a vindictive penalty for seeking a superior court trial" (*id.* at 117), its imposition, and the fact that a defendant's decision to appeal might be inhibited by the risk of a higher sentence in the superior court, does not violate due process.

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court held that due process was not implicated by a higher sentence imposed by a jury on retrial. It emphasized that *Pearce* was premised on the "need to guard against *vindictiveness* in the resentencing process" (*id.* at 25 (emphasis in original)). The Court added (*ibid.*):

> *Pearce* was not written with a view to protecting against the mere possibility that, once the slate

> is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. [395 U.S.] at 723.

Because jury sentencing posed no possibility of vindictiveness, the Court held that due process did not bar a higher sentence on retrial (412 U.S. at 26-28). Moreover, the Court specifically rejected Chaffin's argument that, quite apart from *Pearce*, due process prohibited the imposition of a harsher sentence on retrial because of the "chilling effect" the possibility of such a sentence would have on the right to appeal (*id.* at 29-35). The Court stated that *Pearce* "intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have * * *" (*id.* at 29).

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court did find that there was a realistic possibility that a prosecutor's decision to press more severe charges on retrial would be motivated by a desire to punish the defendant for demanding a new trial. Accordingly, the Court held that such an unexplained increase in the seriousness of the charges levelled at retrial would violate due process. The Court reiterated, however, that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'" (*id.* at 27). And the Court made clear that the presumption of vindictiveness that it found appropriate in *Perry* was one that could be dispelled by other facts, such as

a showing that it would have been impossible to proceed on the more serious charge at the outset (*id.* at 29 n.7).

In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it did not violate due process for the prosecutor to threaten the accused with increased charges if the accused refused to plead guilty, and to follow up on that threat when the accused insisted on his right to stand trial. This action by the prosecutor, the Court concluded, was a legitimate exercise of " 'give-and-take negotiation common in plea bargaining' " (*id.* at 362, quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)) and suggested no element of "punishment or retaliation" (434 U.S. at 363) that would implicate due process concerns. In *Bordenkircher* the Court quite explicitly rejected the contention that due process, as delineated in *Pearce*, protects against anything more than actual vindictiveness. It stated (*ibid.*) that "the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, * * * but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." See also *Corbitt* v. *New Jersey*, 439 U.S. 212, 223 (1978).

Most recently, in *United States* v. *Goodwin*, 457 U.S. 368 (1982), the Court synthesized this line of cases. *Goodwin* held that a presumption of vindictiveness was not appropriate where a prosecutor filed a felony charge after the defendant, who at first had been charged only with a misdemeanor, invoked his right to a jury trial. In the absence of such a presumption, which was not appropriate because the possibility of actual vindictiveness was unlikely (*id.* at

384), the Court explained that a due process violation could be found only if "actual vindictiveness" were affirmatively demonstrated (*id.* at 380, 384).

2. In sum, from *Pearce* through *Goodwin* this Court has not wavered from the position that a due process violation exists in this context only when actual vindictiveness can be found. The presence of an actual retaliatory motivation in a particular case or a defendant's realistic fear that he will be punished for the exercise of a legal right gives rise to a constitutional violation, but where the circumstances do not indicate such vindictiveness, it is entirely permissible for a defendant to be exposed to more severe punishment than he was before he exercised that legal right—for example, by receiving a higher sentence on retrial following a successful appeal. See, *e.g.*, *Chaffin* v. *Stynchcombe*, 412 U.S. at 25. Thus, in those cases where the Court has found that there is no realistic possibility of vindictiveness inherent in the general procedure (see *Goodwin*, *Bordenkircher*, *Chaffin*, and *Colten*), the imposition of an increased charge or sentence upon the accused does not violate due process unless actual vindictiveness is shown (see *Goodwin*, 457 U.S. at 384).

In two cases, *Pearce* and *Perry*, the Court has found that the general situation poses a sufficient danger that either judges or prosecutors will seek to punish defendants for the exercise of a legal right that a presumption of vindictiveness is warranted.[5] But those decisions do not suggest any deviation from the

[5] The Court has explained that the judicial system has an institutional bias against the retrial of issues that have already been decided. Accordingly, when a defendant attacks his conviction and thereby obtains a retrial, there is an institutional pressure that might subconsciously motivate a vindictive response. *United States* v. *Goodwin*, 457 U.S. at 376-377.

basic principle that it is actual vindictiveness against which the Due Process Clause protects. Rather, they simply reflect the Court's awareness that it may be quite difficult for a defendant to prove that an action was in fact animated by a retaliatory motivation. See *Pearce*, 395 U.S. at 725 n.20. As the Court stated in *Goodwin* (457 U.S. at 373): "Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive * * * in cases in which a reasonable likelihood of vindictiveness exists." But this presumption plainly is no more than a shifting of the burden of proof; the presumption may be rebutted by evidence demonstrating a nonvindictive reason for the action. *Goodwin*, 457 U.S. at 374, 376 n.8; *Perry*, 417 U.S. at 29 n.7; *Pearce*, 395 U.S. at 726. Put another way, in that situation the defendant does not have to prove affirmatively the existence of actual vindictiveness in order to defeat the imposition of a higher sentence, but he nevertheless has no grounds for complaint if a showing is made that dispels the realistic possibility of vindictiveness. The ultimate standard remains the same; there is no due process violation unless the circumstances of a particular case (taking into account the appropriate presumptions) demonstrate that the action detrimental to the accused was motivated by a desire to punish his exercise of a legal right.

B. Petitioner's Increased Sentence Demonstrably Was Not The Product Of Vindictiveness And Hence Not Violative Of Due Process

In this case, petitioner obtained a reversal of his first conviction on appeal. After a retrial, he was given what amounts to a higher sentence because, un-

like his first sentence, no portion of it was suspended. This increase, while not nearly as substantial as the sentence increases involved in *Pearce* and its companion case,[6] is sufficient under *Pearce* to create a presumption of vindictiveness; if unexplained, the sentence increase would violate due process. But there is no doubt whatsoever here why petitioner re-

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[6] Petitioner suggests (Br. 9, 16 n.10) that the sentence increase here was quite severe because the actual jail time in the sentence as imposed was increased from six to 24 months. This suggestion ignores the statutory constraints under which the sentencing court was forced to operate and the practical reality of the sentence imposed upon petitioner. In fact, once the court decided that petitioner merited a more severe sentence than he received the first time, the sentence imposed seems the most logical one for the court to have selected.

The court could not have increased the sentence by imposing another split sentence with some increase in the actual time of incarceration. Section 3651 (18 U.S.C.) provides that a split sentence may include no more than six months incarceration. Thus, in order to increase the jail time imposed on petitioner, the court was forced to give him a regular sentence without any portion being suspended. The court could have sentenced him to less than two years, of course, but such a sentence, while perhaps more severe overall, would have yielded a reduction in the total length of the sentence that the court could reasonably have considered inappropriate in light of the additional evidence of petitioner's propensity to engage in criminal conduct. Nor is the practical impact of the increased sentence on petitioner as severe as it appears at first blush. With a two-year sentence, he will first be eligible for parole after eight months and is guaranteed release on the basis of good time credits several months before the two-year sentence would expire (see 18 U.S.C. 4161). Thus, the difference in the sentences is between six months in prison and three years' probation on the one hand and a somewhat longer period in prison but a much shorter parole period, totalling two years, on the other hand.

ceived a higher sentence at retrial. The sentencing judge clearly stated that petitioner now merited a more severe sentence because he had been convicted of another crime in the interim—a circumstance that the judge had specifically noted after the first trial would merit more severe treatment if it were to occur. Thus, it is indisputable that petitioner's higher sentence was imposed for a valid reason and did not reflect any actual vindictiveness toward petitioner's exercise of his right to appeal. Accordingly, the presumption of vindictiveness has been dispelled, and no basis exists for finding a due process violation.

1. ***When an Increased Sentence Is Supported by New, Objective Information Not Known at the Time of the First Sentencing, No Presumption of Vindictiveness Is Warranted***

Under the rationale of *Pearce* and its progeny, the requirements of due process ought to be satisfied if the reasons given by the sentencing judge for the sentence increase provide a sound, nonvindictive basis for the sentence. Those reasons would demonstrate to a reviewing court that the sentencing court did not retaliate against the defendant for the exercise of a legal right and hence would undercut the validity of any presumption of vindictiveness. In particular, the requirement that the sentencing court's reasons be placed on the record subject to scrutiny by a reviewing court effectively eliminates the risk that the source of the increased sentence was a "subconscious motivation" (see Pet. Br. 11; *United States* v. *Goodwin*, 457 U.S. at 377) to punish the defendant for causing a retrial. While every factor that might ordinarily be taken into account at sentencing in the first instance is not necessarily sufficient to dispel a presumption of vindictiveness, it would seem that the

Constitution should permit any objective factual information not available to the first sentencing judge (or demonstrably not considered then for good reasons no longer applicable) to be set forth as a justification for a higher sentence on retrial. Cf. *Pearce*, 395 U.S. at 751 (White, J., concurring).

The language of the Court's opinion in *Pearce*, however, appears to place stricter limitations on the sort of newly discovered facts that may be employed to justify a higher sentence. It refers to "conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726) and "events subsequent to the first trial" (*id.* at 723). Thus, it was apparently the Court's view in *Pearce* that the Constitution would prohibit the second sentencing court from considering facts placed before it that concededly were not known to the first sentencing court, no matter how significant those facts would ordinarily be to the imposition of an appropriate sentence, if the events in question occurred prior to the first sentencing proceeding. Compare 395 U.S. at 751 (White, J., concurring).

We submit that this language in *Pearce* placing a temporal limitation on the facts that may be considered by the second sentencing court may appropriately be reconsidered by the Court.[7] It is not clear that the Court in *Pearce* intended to set an inflexible rule in this regard; rather, the language in *Pearce* can be read as setting forth a general guideline to be fleshed out by the lower courts in light of the principles of *Pearce* and lower court experience with the

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[7] The narrower question of the weight to be given to the "conduct on the part of the defendant" language is discussed in the next point (pages 29-38, *infra*).

prophylactic rule as individual fact situations come before them.

Certainly this latter approach is more consonant with the tradition that legal rules be shaped by the resolution of issues necessarily presented to the court in actual cases and controversies. Any limitation set forth in *Pearce* of the reasons that theoretically could justify a higher sentence is pure dictum.[8] In neither *Pearce* nor its companion case did the State come forth with *any* reasons to justify the sentence increase (see 395 U.S. at 726); hence, the presumption of vindictiveness that the Court held applicable necessarily required overturning the increased sentences, even if there were *no* limitation on the type of reasons that legitimately could rebut the presumption. The longstanding principle that dicta "ought not to control the judgment in a subsequent suit, when the very point is presented for decision" (*Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)) coun-

[8] Three of the eight Justices clearly joined in this dictum. Justice White specifically noted his disagreement with it, stating that, in his view, due process permitted a sentence increase on the basis of "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (395 U.S. at 751). Justices Douglas, Marshall, and Harlan concurred in part on the ground that the Double Jeopardy Clause prohibited any increase in sentence on retrial (*id.* at 726-737; *id.* at 744-751). These Justices did not specifically discuss the appropriate parameters of the Court's due process holding, although Justice Harlan expressed some doubt concerning the merit of a distinction between events occurring after the first trial and prior misconduct subsequently discovered (*id.* at 750 n.8). Justice Black dissented from the Court's due process holding in *Pearce*, stating that he did not believe the Constitution required any statement of reasons by the second sentencing court (*id.* at 740-743).

sels against uncritical acceptance of the precise contours of the prophylactic rule as set forth in *Pearce*. See also *Darr* v. *Burford*, 339 U.S. 200, 214 n.38 (1950); *Wright* v. *United States*, 302 U.S. 583, 593-594 (1938).

It is surely accurate to say that in *Pearce* the "possible bearing [of the prophylactic rule as stated] on all other cases [was not] completely investigated." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) at 400. Indeed, none of the briefs in the cases addressed the question of dispelling a presumption of vindictiveness.[9] Thus, in formulating the standard set forth in *Pearce*, the Court was completely without the "sharpen[ing of] the presentation of issues" provided by the adversary process, "upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 28 & n.28 (noting that jurisdictional question implicitly decided in other cases remained open where not briefed or discussed in those cases); *Stone* v. *Powell*, 428 U.S. 465, 481 (1976).

More important, the temporal limitation suggested by the language of *Pearce* is not supported by the basis of the decision. No logical reason that advances

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[9] The focus of the litigation in *Pearce* was on the propriety of imposing an increased sentence at all. The States argued that there was no constitutional bar to such an increase. The respondents argued that in no circumstances could a sentence be increased on retrial; this argument was based primarily on the grounds that it would violate double jeopardy or unconstitutionally burden the right to appeal. See *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967). The parties did not focus on the possibility of a middle ground, namely, that a sentence increase would be permissible, but only under certain circumstances.

the goal of insuring against vindictive resentencing supports a distinction between events that actually occur after the first sentencing proceeding and events that occur earlier but are not discovered until afterward. Indeed, application of the limitation set forth in *Pearce* can lead to absurd results that could not possibly have been intended by the Court. Suppose, for example, that a defendant is convicted of burglary, a non-violent and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender. Indeed, it is conceivable that a recidivist statute would *require* that he be given a higher sentence because of the prior convictions. It cannot seriously be doubted that this hypothetical situation is one where any presumption of vindictiveness that arises from a more severe sentence at retrial is convincingly dispelled, and *Pearce* ought not to prevent the imposition of such a sentence.[19]

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[19] Significantly, several courts that anticipated this Court's decision in *Pearce*, and found that there were due process constraints on the imposition of an increased sentence after a retrial, did not hold that a legitimate explanation for such a sentence was restricted to events occurring after the first trial. In *United States* v. *Coke*, 404 F.2d 836 (1968) (en banc), the Second Circuit invoked its supervisory power to establish a rule requiring a statement of reasons for an increased sentence at retrial. The court noted, however, that

Perhaps in recognition of the logical deficiencies of the *Pearce* distinction, this Court itself has indicated more recently that *Pearce* need not necessarily be construed inflexibly to exclude information that would dispel the presumption of vindictiveness simply because the information relates to events that occurred before the first sentencing proceeding. In *Goodwin*, the Court stated that the *Pearce* presumption of vindictiveness "may be overcome only by objective information in the record justifying the increased sentence." 457 U.S. at 374 (footnote omitted); see also *id.* at 376 n.8 (noting that analogous *Perry* presumption in prosecutorial vindictiveness context can be "overcome by objective evidence justifying the prosecutor's action"); *id.* at 386 (Blackmun, J., concurring in the judgment) ("prosecutor adequately explains an increased charge by pointing to objective information that he could not reasonably be aware of at the time charges were initially filed"). The Court's treatment of the issue in *Michigan* v. *Payne*, 412 U.S. 47 (1973), also strongly suggests that *Pearce* should not

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these reasons could be based upon newly discovered evidence relating to earlier events, for example, new information that showed that the defendant played a more significant role in the crime than first supposed. See *id.* at 842-843, 845-846. The court explained that "[a] defendant has no vested right in an inadequate record, at least when the inadequacy results from factors beyond the prosecution's control." *Id.* at 846. Similarly, in the companion case to *Pearce*, the district court vacated the unexplained increased sentence imposed at retrial as a violation of due process. The court stated, however, that a higher sentence would be permissible so long as "there is recorded in the court record some legal justification for it." *Rice* v. *Simpson*, 274 F. Supp. 116, 121 (M.D. Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd, 395 U.S. 711 (1969). See also *United States* v. *White*, 382 F.2d 445, 449-450 (7th Cir. 1967), cert. denied, 389 U.S. 1052 (1968).

be read as placing an absolute temporal limitation on the facts that may be considered at resentencing. In *Payne*, the higher sentence was justified by the second sentencing court primarily on the basis of additional information concerning the details of the crime that were elicited at the trial before him, including the defendant's testimony and attitude toward the crime. *Id.* at 48 & n.1.[11] While this Court ultimately did not reach the question whether the explanation satisfied the strictures of *Pearce*,[12] the Court apparently considered it to be an open question (*id.* at 49).[13]

In sum, we submit that the Due Process Clause does not prohibit a court from relying upon objective information unavailable at the first sentencing proceeding, even if it relates to earlier events, in imposing an increased sentence after a retrial. For the

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[11] The affidavit of the second sentencing judge explaining his sentence is set forth in *People* v. *Payne*, 386 Mich. 84, 102-106, 191 N.W.2d 375, 384-386 (1971) (opinion of Black, J.), rev'd, 412 U.S. 47 (1973). The Michigan court's decision that the sentence was invalid rested on its conclusion that these reasons did not satisfy *Pearce* because they did not relate to conduct " 'occurring after * * * the original sentencing.' " See 386 Mich. at 94-95, 191 N.W.2d at 380-381 (quoting 395 U.S. at 726).

[12] Because the Court held that *Pearce* did not apply retroactively, it was unnecessary to consider whether the second sentence satisfied the *Pearce* standards (412 U.S. at 49).

[13] Indeed, it appears that, even shortly after *Pearce* was decided, the courts of appeals did not necessarily understand it as foreclosing the consideration of newly discovered events that antedated the first sentencing proceeding. See, *e.g.*, *United States* v. *Barash*, 428 F.2d 328, 330-331 (2d Cir. 1970); *United States* v. *Kienlen*, 415 F.2d 557, 559-560 (10th Cir. 1969); but see *United States* v. *Markus*, 603 F.2d 409 (2d Cir. 1979). See also *United States* v. *Hayes*, 676 F.2d 1359, 1364-1366 (11th Cir.), cert. denied, 459 U.S. 1040 (1982).

purposes of this case, however, it is unnecessary to resolve this issue because, as we explain below, the sentence imposed here was fully justified even under the constraints of the temporal restriction contained in the *Pearce* dictum, because it was based upon an event that occurred subsequent to the first sentencing proceeding.

2. *The Presumption of Vindictiveness Established in* Pearce *is Dispelled if the Increased Sentence Is Based upon Events Occurring Subsequent to the First Sentencing Proceeding*

Petitioner contends (Br. 5-6) that the increased sentence imposed in this case is invalid because it was not based on "*conduct on the part of the defendant* occurring after the time of the original sentencing proceeding" (395 U.S. at 726 (emphasis added)). Petitioner does not dispute, of course, that the event asserted as the justification for the increased sentence —his conviction on the false certificates charge—did occur subsequent to the first sentencing proceeding. Rather, petitioner's contention is that the conviction itself was not "conduct on the part of the defendant," and the criminal *conduct* that provided the basis for the conviction occurred prior to the first sentencing proceeding; hence, under *Pearce*, it could not lawfully be invoked to justify a higher sentence at retrial. See *United States* v. *Williams*, 651 F.2d 644 (9th Cir. 1981); *United States* v. *Markus*, 603 F.2d 409 (2d Cir. 1979). We submit that this is an unduly narrow and erroneous reading of *Pearce*.

a. *The Decisions of this Court Do Not Compel Excluding Intervening Events from Consideration by the Second Sentencing Court.* The language of *Pearce* focusing on "conduct by the defendant" cannot be taken as setting forth the exact contours of the pro-

phylactic rule without disregarding the rest of the Court's decision in that case. In particular, such a limitation is completely inconsistent with the Court's earlier unequivocal statement (395 U.S. at 723 (emphasis added; citation omitted)):

> A trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of *events* subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources.

A formulation of the prophylactic rule that permits any "event" subsequent to the first sentencing proceeding to be used to justify an increased sentence, rather than only "conduct by the defendant," is certainly more consonant with the rationale of *Pearce*; it is not apparent why a presumption of vindictiveness is any more clearly dispelled when a sentencing court relies upon conduct of the defendant to justify a higher sentence than when it relies upon another, equally significant, event. See page 37, *infra*; cf. pages 25-26, *supra*. Indeed, the other opinions in *Pearce* reflect the view that the rule set forth by the Court was not limited to consideration of conduct of the defendant. Justice Douglas characterized the majority rule as allowing reference to "events subsequent to the first trial" or "information that has developed after the initial trial" (395 U.S. at 736 & n.6); Justice Black characterized it simply as "a requirement that state courts articulate their reasons" (*id.* at 741); Justice Harlan referred to "new facts

[that] develop between the first and second trial" (*id.* at 750).[14]

This Court has not had occasion since *Pearce* to address directly the question of the sort of information that could justify a higher sentence at retrial, but to the extent it has touched on the issue, its statements support the correctness of this broader interpretation of *Pearce*, which would permit consideration by the sentencing court of all events occurring after the first sentencing proceeding. In restating the rule of *Pearce*, the Court has not focused on conduct of the defendant, but rather has referred to "objective information in the record justifying the increased sentence." *United States* v. *Goodwin*, 457 U.S. at 374 (footnote omitted). And in *Blackledge* v. *Perry*, *supra*, where the Court imposed a prophylactic rule analogous to *Pearce*, the one example given by the Court of a scenario under which the presumption of prosecutorial vindictiveness would be rebutted involved no new conduct on the part of the defendant, only the occurrence of another event that significantly affected the charging decision. See 417 U.S. at 29 n.7. See also *United States* v. *Krezdorn*, 718 F.2d 1360 (5th Cir. 1983) (en banc), petition for cert. pending, No. 83-1115.[15] Accordingly, we submit that the court

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[14] Nor did any of the authorities considered by the Court in *Pearce* suggest that the reasons for justifying an increased sentence be limited to subsequent conduct by the defendant. The one case that did suggest a temporal limit on the facts that could be considered (compare note 10, *supra*), stated that it was not "inappropriate for the [second sentencing] court to take subsequent events into consideration." *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967).

[15] While prosecutors are public officials, their function in an adversary system lends some credence to the possibility that they may sometimes act with an improper motivation. This

of appeals correctly held (Pet. App. A19-A24) that the phrase "conduct of the defendant" should not be read as an exclusive, inflexible requirement of the *Pearce* rule. Bearing in mind this Court's repeated injunction that " 'the language of an opinion is not always to be parsed as though we were dealing with language of a statute' " (*CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981), quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979)), *Pearce* should be read as allowing an increased sentence to be justified on the basis of any event occurring subsequent to the first sentencing proceeding.[16]

b. *Limiting Consideration of Subsequent Events to Conduct by the Defendant Interferes with Sensible Sentencing Policy Without Advancing the Purposes*

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is not true of judges, and the Court has noted that "[t]he integrity of the judges, and their fidelity to their oaths of office" ordinarily provides "adequate[] assurance" that their sentencing decisions are not based on impermissible factors. See *United States* v. *Grayson*, 438 U.S. at 54. Therefore, the latitude given to judges with respect to justifying an increased sentence ought to be, if anything, greater than that given to prosecutors.

[16] As the court of appeals stated (Pet. App. A23 n.6), it is likely that the Court in *Pearce* assumed in formulating its rule that all conduct by the defendant that had already occurred would have been considered at the first sentencing proceeding. By the same token, the Court may have assumed that all events relevant to the resentencing would involve conduct by the defendant. Because the litigation of the case did not focus on the due process question, the Court did not have the benefit of briefing by the parties on this issue, which might have pointed out some examples, such as the instant case, in which the Court's "conduct" formulation would lead to a result at odds with the principles of *Pearce*. Thus, a failure to focus exclusively on, and blindly follow, the "conduct" formulation of *Pearce* does not require any divergence from the intent of the *Pearce* Court.

of the Due Process Clause. The distinction petitioner seeks to draw between conduct of the defendant and other significant events "needlessly erase[s] relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness" (Pet. App. A19-A20). The situation presented here is a perfect illustration of the problem. A defendant's prior criminal record is surely one of the most significant items of information for a judge to consider in imposing an appropriate sentence because of the guidance it gives on the defendant's propensity to violate the law. Thus, this Court has recognized that sentencing courts appropriately draw "sharp distinctions * * * between first and repeated offenders." *Williams* v. *New York*, 337 U.S. at 248. Requiring a court to ignore a conviction can substantially defeat the goal recognized in *Pearce* (395 U.S. at 723) of having the punishment fit the offender. In *United States* v. *Williams*, *supra*, for example, the court of appeals' strict adherence to the "conduct" formulation of *Pearce* meant that the court sentencing Williams for bank robbery was unable to increase his sentence on retrial to take into account an intervening first degree murder conviction.

The deleterious effect of excluding such relevant information from the sentencing process goes beyond the windfall benefit that some defendants would receive in the form of unduly lenient sentences. It can also have a harmful effect on defendants as a class. Although some judges, like Judge Roettger in this case, do not take pending charges into account in sentencing, there is no prohibition against considering them. See, *e.g.*, *Williams* v. *New York*, 337 U.S. at 244; *United States* v. *Madison*, 689 F.2d 1300, 1313-1315 (7th Cir. 1982). If petitioner's position were accepted that intervening convictions cannot be con-

sidered, some of these judges might decide to consider the pending charges at the time of the first sentencing to prevent the defendant from escaping without any consideration of the conduct underlying the intervening conviction. *Cf. United States* v. *Goodwin*, 457 U.S. at 379 n.10; *Colten* v. *Kentucky*, 407 U.S. at 119.[17] It certainly appears from the record that if

[17] Petitioner argues (Br. 16-17) conversely that the decision below permits improper pyramiding of sentences because the conviction in this case could be taken into account in the sentencing on the false certificates charge. Even if this were so, there would be nothing improper about it because each sentence would reflect the information before the sentencing court at the appropriate time. In fact, however, petitioner's contention assumes that the second court would ignore the fact that the outstanding conviction was pending on appeal and subject to reversal. Petitioner took much greater note of this fact at the sentencing hearing itself than he does in his brief, as counsel repeatedly called to Judge Davis's attention the fact that an appeal was pending and that petitioner's conviction might well be reversed. See Supp. App. 31-32; see also *id.* at 11, 17, 35. Whether or not Judge Davis was influenced by the pendency of an appeal, it seems fairly clear that he did not give petitioner a more severe sentence because of his passport conviction. The court characterized the sentence as "lenient" and, indeed, appears to have dealt leniently with petitioner partly because petitioner was subject to another sentence on the passport charge (see Supp. App. 39). Thus, petitioner's fear of improper pyramiding is groundless. Indeed, if he had truly been concerned about this possibility, it was within petitioner's power to take steps to avoid it. At the time of the first sentencing hearing, the false certificates charge had been pending for more than a year on a continuance sought by petitioner (see J.A. 25-26); petitioner could have sought to enter his nolo contendere plea earlier and avoided any potential for "pyramiding."

In fact, petitioner suggests a shell game that would avoid all consideration of prior convictions. He would have Judge Roettger not consider the false certificates charge because it

petitioner were to prevail here and this fact situation were to arise again, Judge Roettger would be inclined to depart from his previous policy and would increase the severity of the sentence based on pending charges (see Pet. App. A44, A54-A55). From the perspective of good sentencing practice, it is clearly preferable to allow the court to impose the sentence deemed appropriate on the basis of the full record before it, and an intervening conviction surely should be a factor that may be considered. See *United States* v. *Pacelli*, 521 F.2d 135, 141 n.6 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976). See generally *Pearce*, 395 U.S. at 723; Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1053, 1060-1061 (1980).

Another situation in which the distinction drawn by petitioner leads to serious problems of irrational sentencing is where the defendant's first conviction is pursuant to a guilty plea. It is by now well recognized that it is a common and unobjectionable practice for judges to exercise leniency in sentencing defendants who plead guilty; this practice can ease court congestion by encouraging guilty pleas. Thus, the Court held in *Bordenkircher* v. *Hayes*, *supra*, that a prosecutor's threat to increase the charges if the defendant did not plead guilty was a permissible plea bargaining tactic that furthered the prosecutor's legiti-

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had not yet come to trial; have Judge Davis not consider the passport conviction because it might be reversed on appeal; and have Judge Roettger not consider on retrial the false certificates conviction because of *North Carolina* v. *Pearce*.

mate interest in persuading the defendant not to go to trial (see 434 U.S. at 364). With respect specifically to sentencing, the Court has approved a statutory scheme that made a less severe penalty for homicide available only to defendants who plead guilty. *Corbitt* v. *New Jersey*, *supra*. The Court there reiterated that the government has a "legitimate interest" (439 U.S. at 222) in encouraging guilty pleas, and it affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224 (footnote omitted)). In short, "it is not forbidden to extend a proper degree of leniency in return for guilty pleas" (*id.* at 223). See also *Roberts* v. *United States*, *supra* (leniency for cooperating with government); *Brady* v. *United States*, 397 U.S. 742, 751-753 (1970).

Given this recognized disparity in sentences meted out to otherwise similarly situated defendants depending upon whether or not they plead guilty, it is clear that petitioner's reading of *Pearce* seriously interferes with the sentencing process. It enables a defendant who initially receives a lenient sentence because of a guilty plea to retain the benefit of that lenient treatment at a retrial even though the defendant elects to go to trial. The sentencing court must keep its part of the implicit "bargain" even though the defendant abandons his part of it. See *Pearce*, 395 U.S. at 742-743 (opinion of Black, J.); Aplin, *Sentence Increases on Retrial After* North Carolina v. Pearce, 39 U. Cin. L. Rev. 427, 462-463 (1970). Cf. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606, 620 (1965) (recognizing practice of leniency for guilty pleas but arguing nonetheless (pre-*Pearce*) for blan-

ket prohibition on increased sentence following retrial).[18]

It should be apparent that an increased sentence in either of these situations—either to account for an intervening conviction or for the defendant's decision to abandon his guilty plea and to go to trial the second time—poses no threat to the due process principles embodied in *Pearce*. In each case, there is a strong, nonvindictive reason for the sentence increase that effectively dispels the possibility that it was motivated by a desire to retaliate against the defendant for exercising his right to appeal. Accordingly, any presumption of vindictiveness in such situations should be considered rebutted, and the enhanced sentence should be valid.[19]

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[18] Under federal practice, a defendant may enter a bargain in which his plea of guilty is explicitly conditioned upon imposition of a specified sentence and may be withdrawn if the court does not agree to be bound by that specification. Fed. R. Crim. P. 11(e)(1)(C) and (4). Particularly in the case of a sentence based upon such an agreement, it would be absurd to say that a defendant who thereafter gets his conviction set aside, stands trial, and is reconvicted cannot be given a higher sentence.

[19] In *Simpson* v. *Rice*, the companion case to *Pearce*, the defendant had pleaded guilty at his first trial and pleaded not guilty at his second trial. Thus, it might be argued that *Pearce* holds that a defendant's decision to change his plea from guilty to not guilty can never be a basis for increasing his sentence. But an examination of the factual context indicates that *Pearce* should not be read so broadly. The State made no effort to justify the substantial increase in Rice's sentence. Hence, the Court did not consider whether the leniency of the first sentence on account of a guilty plea could justify an increased sentence, and it was entitled to rely on the district court's finding that the sentence was in fact vindictive. See 395 U.S. at 726. Significantly, Justice Black, who

Indeed, a lack of vindictiveness is similarly shown in the case of any intervening event that provides a sound justification for the sentence increase. Accordingly, we submit that consideration of *Pearce* as a whole compels the conclusion that the "conduct" formulation set forth at the end of the opinion cannot be regarded as the definitive statement of the prophylatic rule. Rather, as the earlier part of the opinion indicates, *Pearce* permits the presumption of vindictiveness to be rebutted by reasons placed on the record by the sentencing court as long as they concern relevant events that occurred subsequent to the first sentencing proceeding and reasonably account for the increase in the sentence (see 395 U.S. at 723). Because it is undeniable that the court here based its increased sentence on petitioner's intervening false certificates conviction—an event that occurred subsequent to the first trial—the sentence is plainly valid under *Pearce*.[20]

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argued vigorously that a defendant's change of plea could, as a general rule, justify a less lenient sentence (*id.* at 742-743), stated that he would nevertheless affirm in *Rice* on the basis of the district court's factual finding of the existence of a retaliatory motivation (*id.* at 739).

[20] The senselessness of the distinction proffered by petitioner is perhaps best illustrated by pointing out that the enhancement here does literally satisfy the "conduct" formulation of *Pearce*. Because the trigger for the increased sentence was petitioner's nolo contendere plea, the sentence can be said to be based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" (395 U.S. at 726). Obviously, it is absurd to have a rule that would allow an increase in petitioner's sentence in this case because of his plea, yet prohibit it if he had gone to trial and been convicted on the false certificates charge.

3. *The Unusual Facts of this Case Demonstrate Beyond Doubt that Petitioner's Increased Sentence Was Not Motivated by Vindictiveness*

At the first sentencing proceeding in this case, petitioner's counsel specifically requested that the court not consider the pending counterfeit certificates charges in determining petitioner's sentence because he had not yet had the opportunity to respond to those charges (J.A. 26). The court readily acceded to that request, explaining that it was its general policy not to consider pending cases, whereas it did believe that the sentencing court "should consider prior convictions" (*ibid.*). At the second sentencing proceeding, after petitioner had been convicted on a counterfeit certificates charge, the court made clear that, in accordance with its standard sentencing policy, it was going to take into account the intervening conviction, which called for an increase in petitioner's sentence (Pet. App. A42). It cannot reasonably be argued that this increase violates the Due Process Clause.

First, as the court of appeals noted (Pet. App. A31), petitioner wishes to have his cake and eat it too. He wants to be able to argue that the sentencing court should not consider his false certificates offense at the first trial because it is premature to do so when the charges are still pending, yet still argue that the offense should not be considered at the second trial because the conduct underlying the intervening conviction occurred before the first trial (and presumably should have been considered then (see Pet. Br. 9)). Under petitioner's view, there is never an appropriate time to consider this manifestly relevant information.

More important, the sentence satisfies due process because it plainly is not the result of vindictiveness.

The court's explanation for the increased sentence clearly establishes a reasonable, nonvindictive basis for the sentence increase. Nor can it even be suggested that this reason is merely a pretext for imposing what is actually retaliation against petitioner for appealing. The court's justification for the increased sentence effectively appears in the record of the *first* sentencing proceeding—before the appeal was taken—because the court there stated its policy that it would not consider pending charges in imposing sentence but would feel compelled to consider a conviction if one were entered. It is difficult to imagine a scenario that would more effectively rebut a presumption of vindictiveness.[21] Indeed, as the court of appeals stated (Pet. App. A24), petitioner does not even appear to contend that the increased sentence was motivated by vindictiveness.[22] Therefore, *Moon* v. *Maryland*, *supra*, sug-

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[21] For example, if there were a statute barring sentencing courts from considering pending allegations, but requiring them to enhance sentences to account for prior convictions, it could not seriously be contended that an increased sentence on retrial pursuant to this statute would be vindictive or violative of due process. In light of Judge Roettger's announced customary sentencing policy, which is stated in the record of the first sentencing proceeding, this case is essentially indistinguishable from one involving such a hypothetical statute.

[22] Petitioner does suggest (Br. 11 n.6) that the transcript of the second sentencing proceeding "reveals strong negative feelings against the Petitioner" on the part of the district court. The type of "negative feelings" discerned by petitioner, however—the alleged displeasure of the district court with the sentence imposed upon him as a result of the intervening false certificates conviction—has nothing to do with the vindictive retaliation for taking an appeal against which *Pearce* was designed to protect. And, as noted above (note 6, *supra*), the

gests that there can be no due process violation here. In sum, regardless of how the general prophylactic rule is stated, the circumstances of this case unequivocally demonstrate that the sentence challenged here was based upon relevant, constitutionally permissible criteria and did not violate due process.

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length of the sentence actually imposed by the court provides no suggestion of vindictiveness.

Moreover, at the sentencing proceedings on which petitioner relies (Br. 11 n.6), petitioner's counsel apparently eschewed reliance on the type of vindictiveness with which *Pearce* was concerned. He suggested that his objection to consideration of the intervening conviction was not because he thought that the court intended to penalize petitioner for going to trial (Pet. App. A45). In addition, the following exchange occurred (Pet. App. A50-A51 (emphasis added)):

> [DEFENSE COUNSEL:] The only other thing that I would like to add is that in the input to the update to the PSI that was presented to Your Honor a couple of days ago by Mr. Schwartz, probation officer, there was another comment by Mr. Hammer that [petitioner] is believed involved, I think it said, in numerous frauds around the State. I'd ask that particular comment be striken [*sic*], not considered just for the record. *I know Your Honor won't* but if they want Your Honor to consider other frauds let them prove the other frauds. You just can't make that statement in a PSI, and I ask that that be striken [*sic*].
>
> THE COURT: I certainly won't consider it.

Thus, defense counsel at the time of the hearing apparently did not believe that the court harbored any retaliatory motivation or animus toward petitioner, and the record clearly shows that it did not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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